STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK R. KOTH and ELIZABETH L. KOTH, Plaintiffs-Appellees, v ERIC B. WEYROWSKE, Defendant-Appellant.	UNPUBLISHED November 30, 1999 No. 209544; 213714 Bay Circuit Court LC No. 95-003435 CH
ERIC B. WEYROWSKE, Plaintiff-Appellant, v FREDERICK R. KOTH and ELIZABETH L. KOTH, Defendants-Appellees.	 No. 209553; 213715 Bay Circuit Court LC No. 95-003473 CH

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

In Docket Nos. 209544 and 209553, defendant, Eric B. Weyrowske,[1] appeals as of right from a judgment of quiet title in favor of plaintiffs. In Docket Nos. 213714 and 213715, defendant appeals by leave granted from an order granting sanctions. We affirm in part and reverse in part.

The parties are neighboring property owners. Plaintiffs moved into the property in 1972, after obtaining it from a family member. Defendant purchased his property in 1991. The boundaries to the respective properties were not established by any fenceline. However, a row of pine trees was presumed, by defendant, to signify the division of the properties. In the summer of 1992, defendant

moved into the home and was working on home improvements when he met plaintiffs. Defendant asked plaintiff Elizabeth Koth if he could trim the pine trees on his side of the property. She allegedly told defendant that the trees were not his, but he could trim them. Plaintiff Elizabeth Koth also allegedly told defendant that he owned the property up to the pine trees. In 1994, defendant had a cement driveway placed on his property. This driveway included an "apron-way" located just to the side of the driveway. Plaintiffs allegedly observed this construction in progress, but did not object to the location of the driveway. On April 14, 1995, plaintiffs demanded that the concrete comprising the apron portion of defendant's driveway, which extended onto plaintiffs' property, be removed by midnight. The relationship between the parties had turned acrimonious after plaintiffs learned, through hearsay, that defendant had allegedly made disparaging comments about plaintiffs, and this litigation commenced. Plaintiffs sought a judgment of quiet title, claiming to have fee title interest to the disputed property. Defendant asserted entitlement to the disputed property through adverse possession and acquiescence. The trial court, following a bench trial, granted a judgment of quiet title to plaintiffs, holding that defendant established adverse possession and acquiescence for a three-year period and not the fifteen-year statutory period required by law. The trial court further held that the short period of occupancy did not afford defendant a claim to the property through laches or occupational lines. The judgment provided that defendant would remove all encroachments and improvements on plaintiffs' property.

Defendant first argues that the trial court erred in failing to recognize his claim of acquiescence to the disputed property. We disagree. Although actions to quiet title are equitable and subject to de novo review, the trial court's factual findings are reviewed for clear error. *Dobie v Morrison*, 227 Mich App 536, 542; 575 NW2d 817 (1998).

In *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996), this Court set forth the three theories of acquiescence: (1) acquiescence for the statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence created by the intention to deed to a marked boundary. Defendant's arguments claim only the first and third alternatives.To prevail on a claim of acquiescence based on the statutory period, there must be a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy over the boundary. *Id.* While defendant asserts that the prior owners of the respective properties accepted the boundary as eighteen feet south of the deed description, the evidence conflicted regarding acquiescence. Alternatively, defendant argues that a claim of acquiescence arose due to the intention to deed to a marked boundary. However, the common grantor, Ernest Derocher, could not definitively testify to the location of the property line. Due to the inconsistent testimony presented below, we cannot conclude that the trial court clearly erred in holding that defendant failed to establish, by a preponderance of the evidence, that the parties and predecessors in interest had acquiesced to defendant's claimed boundary.

Defendant next argues that the trial court erred in granting injunctive relief in the form of requiring the removal of the "apron" portion of the driveway which encroaches on plaintiffs' property. We disagree. We review the decision to grant injunctive relief for an abuse of discretion. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 110; 593 NW2d 595 (1999). The propriety of permitting defendant's continued use of the disputed property despite a judgment of quiet

title in favor of plaintiffs was not raised, addressed, and argued below, and therefore, it is not preserved for appeal. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Because the issue presents a question for which all necessary facts have not been presented, we decline to address it for the first time on appeal. *Id.*[2]

Lastly, defendant argues that the trial court erred in imposing sanctions for defending and filing a frivolous action. We agree. A trial court's finding that a claim is frivolous will not be reversed unless it is clearly erroneous. *LaRose Market, Inc v Sylvan Center, Inc,* 209 Mich App 201, 210; 530 NW2d 505 (1995). A claim or defense is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a); *Cvengros v Farm Bureau Ins Co*, 216 Mich App 261, 266-267; 548 NW2d 698 (1996). In the present case, defendant presented a feasible claim that he could obtain title to the disputed property through equitable principles, but failed to satisfy the burden of proof where the trial court was required to assess the credibility of conflicting testimony. Although defendant was unable to attain legal title to the disputed property, his claim was not without arguable legal merit. *Thomas Industries, Inc v C & L Electric Inc,* 216 Mich App 603, 611; 550 NW2d 558 (1996). Accordingly, the award of sanctions is reversed.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck

[1] Plaintiffs, Frederick R. Koth and Elizabeth L. Koth, filed their complaint to quiet title on July 22, 1995, against defendant Weyrowske. On July 26, 1995, Weyrowske filed his own original complaint against the Fredericks. The actions were consolidated by order of the trial court. However, for purposes of clarity, we will refer to Weyrowske as "defendant" and the Fredericks as "plaintiffs."

[2] In *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 142; 500 NW2d 115 (1993), the relative hardships to each party which would result from an order to remove the encroachment was not preserved in the trial court. However, the Supreme Court addressed the issue despite the defendant's procedural default because failure to review the issue could lead to an unconscionable result. However, in *Kratze*, a removal order would have caused the complete demolition of a structure where the encroachment was a mere 1.2 feet, and the plaintiff, an attorney with thirty years of construction and building experience, purchased the property with knowledge of the encroachment. The failure to review the factual circumstances here would not lead to an unconscionable result.